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No. 81-2332

In the Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, ETC., PETITIONER

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT URGING REVERSAL

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I

QUESTION PRESENTED

Whether the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, entitles a telephone company to compensation for the cost of constructing substitute service lines when public streets are relocated in order to accommodate a municipal urban renewal project funded in part by federal grants.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Secretary of Housing and Urban Development, a defendant and appellee below, is a respondent pursuant to Rule 19.6 of this Court's Rules.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of argument	16
Argument:	
The Uniform Relocation Act does not grant compensation to a utility that, in order to accommodate a federally assisted state or local project, reconstructs in a new street location lines previously located, pursuant to a municipal franchise, within public streets	21
A. Introduction	21
B. Relocation benefits are generally available only to persons displaced by an acquisition of real property	24
C. Respondent's reconstruction of its lines does not constitute moving of personal property that is compensable under the Act	30
D. The reconstruction costs sought by respondent are outside the scope of relocation assistance available under Section 202(a)(1)-(3) of the URA	40
E. Congress' failure in the URA to repeal 23 U.S.C. 123 and the subsequent enactment of the District of Columbia Public Utilities Reimbursement Act of 1972 indicate that Congress did not intend to require payment of relocation expenses to utilities under the URA	43
Conclusion	47
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Alexander v. *United States Department of Housing & Urban Development*, 441 U.S. 39 ..... 2, 4, 25, 35
Artesian Water Co. v. *State Department of Highways & Transportation*, 330 A.2d 432, aff'd as modified, 330 A.2d 441 ..... 11, 12, 27
Bell Telephone Co. v. *Pennsylvania Public Utility Commission*, 139 Pa. Super. 529, 12 A.2d 479 22
Berman v. *Parker*, 348 U.S. 26 27
Board of Supervisors v. *Virginia Electric & Power Co.*, 213 Va. 407, 192 S.E. 2d 768 8
Central Maine Power Co. v. *Waterville Urban Renewal Authority*, 281 A.2d 233 21
Chapman v. *Houston Welfare Rights Organization*, 441 U.S. 600 33
Consolidated Edison Co. v. *Lindsay*, 24 N.Y. 2d 309, 248 N.E. 2d 150, 300 N.Y.S. 2d 321 21-22
Consumers Power Co. v. *Costle*, 615 F.2d 1147 ..... 12, 26, 27
Department of Transportation & Development v. *Beaird-Poulan, Inc.*, 449 U.S. 971 42
Detroit Edison Co. v. *City of Detroit*, 332 Mich. 348, 51 N.W. 2d 245 22
Heller v. *Woodley*, 202 Va. 994, 121 S.E. 2d 527 8
Lone Star Gas Co. v. *Landrieu*, No. 80-100-C (E.D. Okla. Mar. 30, 1981) 12, 26-27
Mountain States Telephone & Telegraph Co. v. *Boise Redevelopment Agency*, No. 52891 (Idaho 4th Judicial D. Oct. 27, 1980), appeal pending, No. 13997 (Idaho Sup. Ct.) 27
New Orleans Gas Co. v. *Drainage Commission*, 197 U.S. 453 ..... 16, 22
Pacific Telephone & Telegraph Co. v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 ..... 12, 27
Pennhurst State School & Hospital v. *Halderman*, 451 U.S. 1 40
Port of New York Authority v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 22
Potomac Electric Co. v. *Fugate*, 211 Va. 745, 180 S.E. 2d 657 23

Cases—Continued: Page

Public Service Co. v. *Harris*, No. 79-C-37-BT (N.D. Okla. Aug. 22, 1980) 12, 27
Robert C. Herd & Co. v. *Krawill Machinery Corp.*, 359 U.S. 297 38
State v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 22
Transcontinental Gas Pipe Line Corp. v. *Prince William County*, 210 Va. 550, 172 S.E. 2d 757 33
Triangle Improvement Council v. *Ritchie*, 402 U.S. 497 43-44
United States v. *564.54 Acres of Land*, 441 U.S. 506 ..... 42, 46
United States v. *Turkette*, 452 U.S. 576 24

Constitution, statutes, and regulations:

U.S. Const.:
Amend. V 16, 22, 26, 34
Just Compensation Clause 16
Amend. XIV 16, 22, 26
Due Process Clause 16
Demonstration Cities and Metropolitan Development Act of 1966, Title I, 42 U.S.C. 3301 *et seq.* 3
District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812: 32, 45
Section 2, 86 Stat. 812 46-47
Section 4, 86 Stat. 813 46-47
Federal-Aid Highway Act of 1958:
23 U.S.C. 123 ..... 19, 20, 32, 44, 45
23 U.S.C. 123(c) 46
Highway Relocation Assistance Act, 23 U.S.C. (1970 ed.) 501 *et seq.* 19, 20, 43, 44, 45
Housing Act of 1949, Title I, 42 U.S.C. (& Supp. IV) 1450 *et seq.* 3, 7, 10
Housing and Community Development Act of 1974, Section 116(a), 42 U.S.C. 5316(a) 3

Constitution, statutes, and regulations—Continued Page

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* 2
Section 101(2), 42 U.S.C. 4601(2) 46
Section 101(4), 42 U.S.C. 4601(4) 46
Section 101(5), 42 U.S.C. 4601(5) 2, 13
Section 101(6), 42 U.S.C. 4601(6) 2, 14, 24, 25, 28, 31, 39
Section 101(7), 42 U.S.C. 4601(7) 13, 36
Section 101(7)(B), 42 U.S.C. 4601(7)(B)..... 36
Section 101(7)(D), 42 U.S.C. 4601(7)(D)..... 37
Sections 201-218 (Title II), 42 U.S.C. 4621-4638 2
Section 201, 42 U.S.C. 4621 2
Section 202, 42 U.S.C. 4622 ..... 4, 10
Section 202(a), 42 U.S.C. 4622(a)....3, 11, 24, 25, 27-28, 30, 38, 39, 40
Section 202(a)(1), 42 U.S.C. 4622(a)(1) 4, 42
Section 202(a)(1)-(3), 42 U.S.C. 4622(a)(1)-(3) 24, 40
Section 202(a)(2), 42 U.S.C. 4622(a)(2) 4, 42
Section 202(a)(3), 42 U.S.C. 4622(a)(3) 4
Section 202(b), 42 U.S.C. 4622(b) 4, 25, 38
Section 202(c), 42 U.S.C. 4622(c) 4
Section 203, 42 U.S.C. 4623 4
Sections 203-204, 42 U.S.C. 4623-4624 25
Section 204, 42 U.S.C. 4624 .....4, 38, 39, 43
Section 205, 42 U.S.C. 4625 4
Section 210, 42 U.S.C. 4630 ..... 4, 40
Section 213(b)(3), 42 U.S.C. 4633(b)(3) 5
Section 213(c), 42 U.S.C. 4633(c) 5
Section 217, 42 U.S.C. 4637 .....3, 10, 14, 17, 24, 27, 28-29, 31
Section 220, 84 Stat. 1903 43
Section 301(8), 42 U.S.C. 4651(8) 26

28 U.S.C. 1331(a) 12
28 U.S.C. 1346(a)(2) 41
28 U.S.C. 1361 12
Va. Code § 25-235 (repl. 1976) 5

Constitution, statutes, and regulations—Continued Page

Va. Code § 36-4 (repl. 1976) 7
24 C.F.R.:
Section 42.15(b) 5
Section 42.703(b) 5
Section 42.707(a) 10
Section 42.707(b)(4) 5
Section 42.711 5
40 C.F.R. 4.104 5

Miscellaneous:

115 Cong. Rec. (1969):
p. 31372 36
p. 31533 ..... 26, 34
p. 31534 ..... 26, 34
116 Cong. Rec. (1970):
p. 40167 34
p. 40170 34
12 E. McQuillin, *The Law of Municipal Corporations* (3d ed. 1970) 21
4A Nichols, *The Law of Eminent Domain* (J. Sackman rev. 3d ed. 1970) 21
H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. (1970) 26, 29, 34, 35, 36, 45
H.R. Rep. No. 92-906, 92d Cong., 2d Sess. (1972) .. 26, 45
S. 1681, 89th Cong., 2d Sess. (1966) 29
§ 9 29
S. 1, 91st Cong., 1st Sess. (1969) 29
§ 105(5) 36
S. Rep. No. 1378, 89th Cong., 2d Sess. (1966) 29, 35
S. Rep. No. 90-1456, 90th Cong., 2d Sess. (1968) .. 35
S. Rep. No. 91-488, 91st Cong., 1st Sess. (1969) ..2, 34, 35, 36, 38, 43
S. Rep. No. 92-1254, 92d Cong., 2d Sess. (1972) 45
Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S.1 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 91st Cong., 1st Sess. (1969) 35

Miscellaneous—Continued Page

Uniform Relocation Assistance and Land Acquisition Policies—1970: Hearings on H.R. 14898, 14899, S.1 and related bills Before the House Comm. on Public Works, 91st Cong., 1st & 2d Sess. (1969-1970) 35

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 63-78) is reported at 674 F.2d 298. The opinion of the district court (J.A. 48-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1982. The petition for a writ of certiorari was filed on June 22, 1982, and was granted on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, is set forth in relevant part in the Appendix, *infra*, 1a-4a.

STATEMENT

1. Congress enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"), 42 U.S.C. 4601 *et seq.*, to "provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by Federal or federally assisted programs." S. Rep. No. 91-488, 91st Cong., 1st Sess. 1 (1969). Title II of the Act, 42 U.S.C. 4621-4638, established a program of relocation assistance to assure that persons displaced by federal or federally-funded projects do "not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 U.S.C. 4621.

Under Section 101(6) of the URA a "displaced person" is generally one who "moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part * * * for a program or project undertaken by a Federal agency, or with Federal financial assistance." 42 U.S.C. 4601(6).[1] In addi-

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[1] Alternatively a person who moves in response to a written order to vacate issued by an agency that has acquired, or proposes to acquire, real property for purposes of a federal project or a federally-assisted project, where the order results directly from an actual or contemplated acquisition, is also deemed a displaced person. 42 U.S.C. 4601(6); see *Alexander* v. *United States Department of Housing & Urban Development*, 441 U.S. 39, 62-63 (1979).

Under Section 101(5) of the Act, 42 U.S.C. 4601(5), the term "person" as employed in the URA is not limited to

tion, under a special provision of the Act, Section 217, 42 U.S.C. 4637, any person who after the effective date of the statute "moves or discontinues his business, or moves other personal property, or moves from his dwelling * * * as a direct result of any project or program which receives Federal financial assistance under" either the Urban Renewal or Model Cities programs administered by the Department of Housing and Urban Development, "shall * * * be deemed to have been displaced as a result of the acquisition of real property." [2]

Section 202(a) of the URA, 42 U.S.C. 4622(a) provides:

> Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person * * * the head of such agency shall make a payment to any displaced person * * *.

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natural persons but includes any individual, partnership, corporation, or association.

[2] The Urban Renewal Program established under Title I of the Housing Act of 1949, 42 U.S.C. (& Supp. IV) 1450 *et seq.*, and the Model Cities Program established under Title I of the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. 3301 *et seq.*, have been superseded by other legislation. Section 116(a) of Housing and Community Development Act of 1974, 42 U.S.C. 5316(a), provided that no new grants were to be made under the Urban Renewal or Model Cities programs after January 1, 1975, except where funds had previously been committed thereto. The Department of Housing and Urban Development advises us that only a small number of ongoing urban renewal projects still exist. This case, however, arises from such a project. See pages 7-8, *infra*.

Assistance available under the URA includes "actual reasonable expenses in moving [a displaced person], his family, business, farm operation or other personal property" and "actual direct losses of tangible personal property as a result of moving or discontinuing a business * * * operation." 42 U.S.C. 4622(a)(1) and (2).[3]

State agencies acquiring real property with federal financial assistance are also effectively required to comply with the relocation assistance provisions of the URA. Section 210 of the Act, 42 U.S.C. 4630, prohibits the head of any federal agency from awarding

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[3] Assistance under the latter provision may in no event exceed the expense that would have been incurred in relocation. 42 U.S.C. 4622(a)(2). Under Section 4622(a)(3) the costs of locating a replacement business location are also recoverable.

In lieu of reimbursement for actual moving expenses incurred by displaced persons, 42 U.S.C. 4622(b) authorizes payment of fixed moving and dislocation allowances to persons dislocated from a dwelling. In certain circumstances similar payments computed by a formula based upon annual net earnings are available in lieu of actual moving costs to displaced businesses that cannot feasibly be relocated. 42 U.S.C. 4622(c).

In addition to the *relocation assistance* allowances required by Section 202 of the URA, Sections 203 and 204 of the Act, 42 U.S.C. 4623 and 4624, provide for payment of certain *costs of comparable replacement housing* for homeowners and tenants displaced from their dwellings by federal or federally assisted acquisitions, provided that occupancy requirements are met. Section 205 of the Act, 42 U.S.C. 4625, requires federal agencies to provide relocation advisory services to persons displaced by real property acquisitions for federal projects as well as to persons located immediately adjacent to the acquired property determined to have suffered substantial economic injury because of the acquisition. See *Alexander* v. *United States Department of Housing & Urban Development*, *supra*, 441 U.S. at 42 n.1.

federal grant funds to any state agency for a project that will result in displacement of any person unless he first receives "satisfactory assurances" from the grantee that "fair and reasonable relocation payments and assistance shall be provided to or for displaced persons" such as are required to be made by federal agencies under the Act.[4] Federal agencies are directed to promulgate regulations affording any person aggrieved by denial of relocation benefits in connection with such a project the right to have his application for benefits reviewed by the head of the state agency. 42 U.S.C. 4633(b)(3).[5] There is no statutory requirement that a right of administrative appeal to the federal grantor be provided, but some federal agencies have promulgated regulations to that effect under the residual rulemaking authority vested in them by the Act. See 42 U.S.C. 4633(c); compare 24 C.F.R. 42.703(b) and 42.707 (HUD regulations providing for appeal to HUD from grantee's denial of relocation benefits)[6] with 40 C.F.R. 4.104 (EPA regulations making no provision for appeal to EPA from displacing agency's denial of relocation benefits).

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[4] Many states, including Virginia, see Va. Code § 25-235 *et seq.* (repl. 1976) have adopted legislation modeled on the URA in order to comply with the obligations imposed on recipients of federal grants.

[5] In the case of direct federal projects the right of review required by the Act lies to the head of the federal agency. 42 U.S.C. 4633(b)(3).

[6] Under HUD regulations the grantee agency is required to make any relocation assistance payment determined to be due by the federal agency upon review of the state agency's action. 24 C.F.R. 42.15(b). The regulations also make clear the availability of judicial review of HUD action adverse to a person claiming relocation benefits. 24 C.F.R. 42.707(b)(4) and 42.711.

2. In 1898, the City of Norfolk, Virginia, enacted an ordinance granting respondent's predecessor,[7] the Southern Bell Telephone Company, permission (J.A. 228-229).

> to erect, operate and maintain its lines, including the necessary poles, wires and fixtures, upon, along and over sub-ways, with the necessary manholes and other appurtenances, under the surface of such public ways for the purpose of transmitting communication by electricity, the use of such public ways to be under such regulation affecting the general supervision and maintenance of such public ways as may be prescribed by law and the ordinances of [the City of Norfolk] * * *.

In return for permitting Southern Bell to install and maintain its lines on public ways, the City stipulated that it was to receive free service for its fire alarm wires (J.A. 230-231), free use of ten telephones (J.A. 231), and an annual fee of three percent of Southern Bell's gross earnings from local telephone service (*ibid.*).

Yet another condition of the franchise was that Southern Bell "shall, upon notification by the City Engineer that he intends to lay sewer or water pipes, at once proceed to change the location of any subways constructed by it that may interfere with the progress of the work, or else protect the same at its own expense and without cost to the city" (J.A. 236-237). The 1898 ordinance further provides that Southern Bell should "at all times be subject to the general ordinances of the city now in existence or which may be hereafter passed, relative to the manner of the use of public streets or other public places by telegraph

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[7] We employ the term respondent to denote the plaintiff, Chesapeake and Potomac Telephone Company of Virginia.

or telephone companies" (J.A. 241). Finally, the City reserved to itself the right to amend, alter or repeal its ordinance "at its pleasure and without making any compensation for any damage that may result from such amendment, alteration or repeal" (*ibid.*).

Pursuant to its franchise, respondent has from time to time installed underground conduit carrying telephone cables and constructed appurtenant manholes needed for service access throughout the street network of the City of Norfolk.

3. a. Petitioner Norfolk Redevelopment and Housing Authority is an autonomous political subdivision of the Commonwealth of Virginia, independent of, but located in, the City of Norfolk, created under Va. Code § 36-4 (repl. 1976). In the 1960's, petitioner embarked upon several urban renewal projects employing federal grant funds under Title I of the Housing Act of 1949 (see page 3 note 2, *supra*) designed to eliminate slums and urban blight in various parts of Norfolk. Petitioner's redevelopment plans entailed the acquisition of private property in the project area, demolition of irredeemably blighted buildings, rezoning and comprehensive planning for redevelopment, and disposition of the acquired land for various public and private uses, including renovation of reparable buildings and new construction, pursuant to the redevelopment plans.

Petitioner's urban renewal plans also required the reconfiguration of certain land parcels requiring realignment of street patterns. Petitioner arranged for the relocation of city streets where required by its plans by acquiring the land abutting the streets. Under Virginia law, this gave petitioner title to the land underlying the street itself, subject only to the city's overriding easement to use the street bed as a

public way. See *Board of Supervisors* v. *Virginia Electric & Power Co.*, 213 Va. 407, 412, 192 S.E.2d 768, 771 (1972); *Heller* v. *Woodley*, 202 Va. 994, 998, 121 S.E.2d 527, 531 (1961). Petitioner then requested that the City of Norfolk close the streets to be relocated. The City ultimately adopted ordinances closing the streets in question, discharging the servitude upon the property and freeing the land for other uses. In the course of its redevelopment activities, petitioner successfully sought the closing of streets in six different redevelopment locations. After a street had been closed, the City would open a new street constructed in the location specified by petitioner's redevelopment plan.

Among the locations in which respondent had installed lines under its franchise were the six streets that petitioner had, in conjunction with the City, relocated. Because of petitioner's acquisition of the land abutting these streets and Norfolk's subsequent closing of the streets, respondent's franchise no longer attached to these former rights-of-way. That franchise did, of course, attach, without further cost to respondent, to the new streets established under the redevelopment plan.[8] In order to provide service to its customers (including those to be located in the redeveloped area) respondent constructed new manholes and laid new conduit and cable in the newly created streets.[9] Respondent abandoned its existing conduits

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[8] In some cases it was necessary for respondent to install equipment in the new street locations prior to their formal dedication to the City as streets. In these instances petitioner granted respondent an interim right of entry for this purpose (J.A. 170-171, 215-218).

[9] The stipulation of facts entered by the parties recites (J.A. 45):

and manholes in the streets that were closed by the City (J.A. 100-101, 132-133).[10] The actual electrical cables that ran through the abandoned conduits were removed, occasionally to be stored for reuse, but more commonly to be sold for their scrap value (J.A. 132-134).

b. When construction of its new lines in the redevelopment area neared completion, respondent filed a claim with petitioner seeking to recover the cost of constructing new facilities in the amount of $686,422.53 (see J.A. 265).[11] Respondent generally sought to recover the cost of constructing replacement utility lines where it had constructed the new lines in the newly created streets as substitutes for lines located in the streets that had been closed. In at least one instance, however, respondent sought to recover the cost of constructing facilities in an altered location within an existing street bed (see J.A. 94).

Petitioner denied respondent's claim and adhered to its decision in the face of respondent's request for reconsideration. Then, because petitioner's urban re-

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> 13. After passage of the several street closing ordinances [respondent] was not permitted to retain [its] [f]acilities in the former street beds, except upon a temporary basis.

It is not clear whether or to what extent respondent could have met its service requirements, including those for the redeveloped area and the rest of its service area by retaining its lines in their former locations (see J.A. 89-90). Nor is it clear whether respondent sought easements from petitioner to permit it to do so (see J.A. 167-170).

[10] The tops were removed from the manholes, and the access space beneath was filled with dirt and covered over, while the conduits were abandoned in place (J.A. 100-101, 132-133).

[11] Petitioner had evidently assumed that respondent would bear this expense and had not included any item in its project budget for this expense (J.A. 269-270 nn. 3 & 4).

newal projects were federally assisted under Title I of the Housing Act of 1949, respondent petitioned the Department of Housing and Urban Development for review of petitioner's decision, pursuant to HUD regulations implementing the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act (see J.A. 8-11). Pursuant to agency regulations, the request for review was directed to the area office of HUD. See 24 C.F.R. 42.707(a).

The HUD area manager upheld petitioner's rejection of respondent's claim (J.A. 263-291). Petitioner argued that, as a matter of fact and state law, the City, a legal entity distinct from itself, was responsible for the street closing that ousted respondent's franchise. The area manager was not persuaded that petitioner could avoid responsibility for payment of any relocation costs otherwise due on this basis (J.A. 271-273). In any event, because the street was closed as part of an urban renewal project, the area manager determined that the special rule of 42 U.S.C. 4637 applicable to such projects was controlling. The area manager accordingly determined that persons required to move as a result of the project should be deemed to have been displaced as the result of "the acquisition of real property" for purposes of determining the availability of relocation benefits under Section 202, 42 U.S.C. 4622.[12]

The area manager also rejected petitioner's contention that the lines relocated by respondent are real property rather than personal property and that the associated expense accordingly is not recoverable un-

[12] The area manager also noted that petitioner had acquired all of the land abutting the street, and that it was that acquisition that enabled petitioner to have the street closed, displacing respondent's franchise right (J.A. 274).

der Section 202(a) of the URA, 42 U.S.C. 4622(a). Applying the law of fixtures, and believing that all of the expense for which respondent sought compensation entailed equipment actually "removed from the public ways" (J.A. 278), the area manager concluded that the equipment involved had not become affixed to the land (J.A. 275-278).

The area manager nevertheless denied respondent's claim, finding no evidence that the URA was intended to alter the prevailing common law rule that a utility is not eligible for compensation when required to relocate its lines, removing from service equipment placed in street locations pursuant to a franchise granted by the local governing body, so as to accommodate public improvements, or exercise of the police power (J.A. 278-286).[13] The area manager's decision informed respondent of its right to secure judicial review of her action (J.A. 286).

4. On October 10, 1979, respondent commenced this action in the United States District Court for the Eastern District of Virginia. By its complaint (J.A. 1-14) naming the Secretary of Housing and Urban Development and petitioner as defendants, respondent alleged a violation of the URA, and sought relief under the Administrative Procedure Act, the Declara-

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[13] The area manager cited with approval the decision of the Delaware court in *Artesian Water Co.* v. *State Department of Highways & Transportation*, 330 A.2d 432 (1974). The area manager also pointed to legislative history indicating that the URA was intended to conform to existing HUD rules governing eligibility for relocation assistance, and observed that those rules had excluded the cost of utility line relocation from eligible project costs unless state or local law or the particular franchise agreement required the housing authority to pay them (J.A. 283-284).

tory Judgment Act, and 28 U.S.C. 1361.[14] Respondent sought declaratory, mandatory and monetary remedies: a declaration that it is entitled to compensation under the URA upon its claim; an order that the Secretary direct petitioner to pay that compensation, and a judgment, in the amount of $686,422.53, plus interest from the date of claim until payment, against each defendant (J.A. 12-13).

The district court ordered a bifurcated trial (J.A. 34-35). Evidence and a stipulation of undisputed facts (J.A. 37-47) pertaining to liability was received in the first phase. After the liability trial the district court entered judgment for the defendants (J.A. 48-61). The district court followed the decisions of other federal courts and decisions of state courts holding that a utility required to move its lines from a public street to accommodate public works is not entitled to relocation assistance under the URA (J.A. 52-55).[15] Because the common law rule requiring utilities to bear the cost of relocating their lines when necessitated by public activity was well established, the court concluded that the absence of any language in the URA or its legislative history reflecting a purpose to alter prevailing practices was a telling indication that no such change was intended (J.A. 55-57). Finally,

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[14] Jurisdiction was premised upon 28 U.S.C. 1331(a) and 28 U.S.C. 1361.

[15] As authority for its decision, the district court cited *Consumers Power Co.* v. *Costle*, 615 F.2d 1147 (6th Cir. 1980); *Lone Star Gas Co.* v. *Landrieu*, No. 80-100-C (E.D. Okla. Mar. 30, 1981); *Public Service Co.* v. *Harris*, No. 79-C-37-BT (N.D. Okla. Aug. 22, 1980); *Artesian Water Co.* v. *State Department of Highways & Transportation*, *supra*, and *Pacific Telephone & Telegraph Co.* v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 (1978) (interpreting parallel provisions of state law).

the district court observed that the ability of publicly regulated monopoly utilities to include the cost of substitute facilities in their rate bases, and thus to assure recovery of the full cost of relocation from its customers, set such utilities apart from the businesses and individuals that Congress intended to protect in the URA (J.A. 57-60).

5. The court of appeals reversed (J.A. 63-78). The court deemed misplaced the reliance of the district court and the defendants upon the common law rule denying compensation to utilities that move their lines. The court stated (J.A. 68):

> The [URA] was intended to create rights that were not recognized at common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure explicitly to mention the situation of utilities was not significant in the court of appeals' view, for the legislative history was thought to reflect an intent "to extend benefits *uniformly* to persons who are displaced by federal acquisition of real property" (J.A. 70; emphasis added). The court concluded that (*ibid.*) "[e]xclusion of utilities from the Act's coverage would run counter to that purpose." Framing the issue in controversy as whether a utility comes within the URA's definition of a "*business*" (42 U.S.C. 4601(7)) and thus within the statutory definition of a "*person*" (42 U.S.C. 4601(5); see page 2 note 1, *supra*), the court of appeals answered the question affirmatively and readily concluded that

respondent is a *displaced person* within the meaning of 42 U.S.C. 4601(6) and accordingly is eligible for relocation benefits under the Act (J.A. 66-67, 70-71).

The court of appeals rejected two additional arguments raised by petitioner and the Secretary. First, the court concluded that respondent's relocation should be regarded as "a result of acquisition of * * * real property * * * for a program or project undertaken by a Federal Agency or with federal financial assistance" (42 U.S.C. 4601(6)), notwithstanding the fact that the direct cause of the move was the City's closing of the streets.[16] The court observed that petitioner's acquisition of the abutting property had been an essential element of the petitioner's plan to acquire title to the street beds, that the street closings were an integral part of the overall scheme, and that the City had acted in close cooperation with petitioner in closing the street (J.A. 71-73).[17]

Second, the court of appeals rejected defendants' contention that respondent's expenses were not com-

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[16] The court of appeals did not rely upon 42 U.S.C. 4637 for its conclusion. Compare page 10, *supra*.

[17] The court of appeals noted that some of the utility line relocations did not result from complete closure of a street (see page 9, *supra*), and directed that the district court determine upon remand whether the expenses incurred by respondent in such instances "resulted in whole or in part from the federal acquisition" (J.A. 73). (The court of appeals referred repeatedly to federal acquisition of real property. Strictly speaking, no agency of the United States acquired any real property interest in connection with petitioner's urban renewal projects. Rather, under the urban renewal program, petitioner, HUD's grantee, acquired the land in the urban renewal area abutting the streets that were closed.)

pensable because they did not relate to movement of personal property, but to a realty interest (J.A. 74-78). Treating the question as one governed by the state law of fixtures, the court concluded that the telephone lines were to be regarded as personalty, because respondent "could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners" (J.A. 75). The court observed that all of the parties had recognized respondent's "right" to remove its equipment from the closed streets, a right that is inconsistent with a characterization of the equipment as fixtures (J.A. 75-76). The court also explained that characterization of the lines as personal property is consistent with what it regarded as the purpose of the statutory limitation upon relocation benefits (contained in 42 U.S.C. 4622(a)(1)) to the expense of moving personal property: to bar payment of duplicate compensation to one who is already entitled to just compensation for a taking of his "nonremovable real estate" (J.A. 78). The court observed (*ibid.*):

> There is no possibility of double compensation here, for [respondent] did not sell any land, and it received no compensation through any sale or condemnation.

The case was remanded to the district court for further proceedings (*ibid.*).[18]

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[18] The court of appeals did not consider what remedy might be appropriate on remand.

SUMMARY OF ARGUMENT

A. Under the common law of the states it is well established that utilities that avail themselves of municipal franchises authorizing the location of lines within public streets are required to absorb the expense of relocating those lines whenever the public convenience or necessity so requires. It is equally well established that this rule does not offend the Fifth Amendment Just Compensation Clause or the Fourteenth Amendment Due Process Clause. See *New Orleans Gas Co.* v. *Drainage Commission*, 197 U.S. 453 (1905). The question presented in this case is whether the Uniform Relocation Assistance and Real Property Acquisition Policies Act overrides the common law doctrine and requires a municipal corporation that displaces utility lines from city streets in connection with a federally-assisted project to reimburse the utility for its expenses in constructing substitute lines in new street locations.

B. In order to be eligible for relocation assistance under the Uniform Act, a person is required to establish three threshold qualifications. *First*, he must show that the cause of his displacement is an acquisition of the real property that he formerly occupied. *Second*, he must show that he has moved his personal property from real property. *Finally*, he must show that the items for which reimbursement is sought are compensable under the Act.

Displacement of utility lines from street locations by federally funded state or local public works projects ordinarily does not create a basis for payment of relocation benefits under the Act, because displaced utilities typically cannot meet the first of the foregoing statutory requirements. That is, because the local government entity already owns the public street (or a right-of-way therein), displacement of a utility

line from its location in the public right-of-way does not result from an acquisition of the street bed. Moreover, ouster of a utility's line from a street location effects no taking and thus does not result from an acquisition of a protected property right belonging to the utility itself.

Nevertheless, because of the nature of urban renewal projects, which typically entail street closings in conjunction with acquisition of adjacent property, and the rule of Virginia law that gives the owner of adjoining property title to the street bed, an argument is available to respondent that its displacement *does* result from the acquisition of the real property it occupied. In addition, although there is contrary legislative history, it is arguable that, for purposes of urban renewal projects Section 217 of the URA eliminates the requirement that displacement be directly traceable to an acquisition of the real property occupied by the person displaced. Even if respondent can qualify as a person displaced by acquisition of real property, however, it is not entitled to relocation assistance because it can meet neither of the two remaining requirements for reimbursement under the URA.

C. 1. First, respondent has not actually moved personal property from real property. Instead it has merely abandoned the bulk of its equipment in place and sold the rest for salvage. Respondent thus has not moved the equipment formerly in service in the old locations to its substitute locations. Moreover, it appears that respondent's conduct is typical of utilities that relocate their lines. Significantly, when Congress has made provision for payment or reimbursement of relocation expenses incurred by utilities, it has adopted formulas that reflect the understanding

that utilities do not move their former lines in the fashion that businesses and natural persons move their personal property. Thus respondent simply has not relocated its property in the sense Congress had in mind in providing for relocation benefits.

2. Even if respondent had in a literal sense moved its equipment from the former locations of its lines to the new ones, no relocation assistance would be due it, for the legislative history of the URA strongly suggests that Congress did not intend to provide relocation benefits to utilities that relocate their lines to accommodate local public works projects. Congress' purpose in enacting the URA was instead to provide a supplemental measure of compensation for businesses and families displaced from the premises they occupied by an acquisition of real property. Relocation benefits were intended to complement the market value standard developed by the courts under the Just Compensation Clause by providing for actual moving costs, as well as providing for the cost of acquiring comparable substitute residential or business premises in excess of the market value of the premises taken. But nowhere in the extensive legislative history of the URA compiled by Congress over a ten-year period is there any suggestion that the bill would override the common law rule allocating the cost of utility relocation caused by public works projects to the utility franchise holder. Thus there is no reason to believe that Congress used the inartful terms "moves * * * personal property" to describe the reconstruction of utility lines.

3. In the absence of any indication of legislative intent to do so, Congress should not lightly be pre-

sumed to have overridden the common law rule in a manner that imposes substantial obligations upon state and local governments, as well as the United States. Merely because the URA creates some rights unknown at common law, it does not follow that state and local governments must bear the expense of utility relocation triggered by federally assisted projects. The court of appeals' reasoning overlooks the limiting language that defines the rights created by statute. Thus, for instance, it is immaterial that Congress contemplated payment of relocation assistance to residential tenants-at-will displaced by real property acquisition. In such cases displacement clearly entails moving of personal property.

D. Respondent also cannot satisfy the final statutory prerequisite for the availability of relocation assistance under the URA, for its claims do not represent actual reasonable expenses in *moving* a business or personal property. Instead respondent seeks to recover the very costs of *constructing* substitute facilities explicitly assigned to it by state law.

E. Congress' selective repeal of existing statutory provisions at the time it enacted the URA confirms that the URA does not require payment of the respondent's claims. In enacting the URA Congress repealed the special relocation assistance provisions of the former Highway Relocation Assistance Act (23 U.S.C. (1970 ed.) 501 *et seq.*) upon which it was modeled. However, Congress did not repeal 23 U.S.C. 123, which stipulates that federal funds may be used by states to pay utilities relocation expenses caused by highway construction if *and only if* state law requires reimbursement of such expenses. In view of Congress' sweeping and methodical repeal of

other provisions of law that were inconsistent with, or were absorbed by the URA, Congress' failure to repeal Section 123 is a strong indication that the URA does not override the common law rule requiring utilities to bear the expense of such relocation.

Similarly telling is the enactment by Congress, in 1972, of the District of Columbia Public Utilities Reimbursement Act, which requires the compensation of utilities for relocation expenses that result from urban renewal and highway projects in the District of Columbia only. This enactment would have been unnecessary if the URA had already required such compensation.

We note as well that under any measure or formula for determining the relocation costs of utilities it is necessary to take into account both the increased value of substitute facilities constructed and any salvage value of old equipment removed from service. The URA makes no provision for such computations. A striking contrast is provided by Section 123 of the Highway Act and the District of Columbia Public Utilities Reimbursement Act, each of which provide a formula for taking into account the special aspects of utility relocation in determining any benefit to be paid.

ARGUMENT

THE UNIFORM RELOCATION ACT DOES NOT GRANT COMPENSATION TO A UTILITY THAT, IN ORDER TO ACCOMMODATE A FEDERALLY ASSISTED STATE OR LOCAL PROJECT, RECONSTRUCTS IN A NEW STREET LOCATION LINES PREVIOUSLY LOCATED, PURSUANT TO A MUNICIPAL FRANCHISE, WITHIN PUBLIC STREETS

A. Introduction

For obvious reasons utilities such as respondent that transmit gas, electricity or telephonic communications through pipes or by wire from a centrally located distribution point to numerous customers typically find it convenient to install their distribution lines within the pre-existing networks that provide convenient access to those customers—the public street systems that exist in every municipality in the United States. States and their municipalities have traditionally allowed access for this purpose to utility corporations through the grant of franchises, permits or licenses similar in terms to that granted by the City of Norfolk to respondent's predecessor in 1898. Yet the rights acquired by utilities pursuant to such instruments have a special character. Pursuant to the common law of the states, whenever public convenience or necessity so requires, a utility occupying a public right-of-way is expected to relocate its lines at its own expense. 12 E. McQuillin, *The Law of Municipal Corporations* § 34.74a (3d ed. 1970); 4A Nichol's, *The Law of Eminent Domain* § 15.22 (J. Sackman rev. 3d ed. 1970).[19]

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[19] See, *e.g.*, *Central Maine Power Co.* v. *Waterville Urban Renewal Authority*, 281 A.2d 233 (Me. 1971); *Consolidated Edison Co.* v. *Lindsay*, 24 N.Y. 2d 309, 248 N.E. 2d 150, 300

This Court has recognized the prevailing common law rule, and has held that the denial of compensation to a utility required by a state or municipality to relocate its lines within the public streets does not effect an unconstitutional taking of property in violation of the Fourteenth and Fifth Amendments. In *New Orleans Gas Co.* v. *Drainage Commission*, 197 U.S. 453 (1905), the Court held that the New Orleans Drainage Commission was not required to compensate a natural gas distribution company for the expense of relocating its lines from their existing alignment, established pursuant to a municipal franchise, beneath city streets, when those lines were dislodged in order to accommodate construction of a drainage system. The Court stated (*id.* at 462):

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.

N.Y.S. 2d 321 (1969); *Port of New York Authority* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963); *State* v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959); *Detroit Edison Co.* v. *City of Detroit*, 332 Mich. 348, 51 N.W. 2d 245 (1952); *Bell Telephone Co.* v. *Pennsylvania Public Utility Commission*, 139 Pa. Super. 529, 12 A.2d 479 (1940).

The decisional law of Virginia embodies this rule. See *Potomac Electric Power Co.* v. *Fugate*, 211 Va. 745, 180 S.E. 2d 657 (1971). Moreover, the franchise under which respondent located its lines in the streets of Norfolk reflects the limitation upon the rights of the franchisee in several respects. First, the 1898 Norfolk ordinance grants the telephone company no vested right to maintain its lines in any particular location. Rather, the rights granted by their terms apply only within "public ways" (J.A. 229). And there is nothing in the franchise ordinance that suggests that the City has constrained its authority to close or alter the location of such streets. On the contrary, the ordinance affirms that the telephone company's rights are subject to "such * * * regulation affecting the general supervision and maintenance of such public ways as may be prescribed by law and the ordinances of" the City of Norfolk (*ibid.*) The terms of the franchise thus subject respondent to, *inter alia*, the City ordinances closing the streets to be rerouted in this case. The prevailing common-law rule is also reflected in the provision of the Norfolk ordinance (J.A. 236-237) requiring respondent to bear the expense of changing the location of its underground lines, when necessary to accommodate other public improvements—construction of water or sewer lines. Finally, the City reserved to itself in the ordinance (J.A. 241) the ultimate right to amend, alter or repeal the franchise granted without payment of compensation.

Under the prevailing common law rule, as recognized in Virginia, and embodied in the ordinance under which respondent's lines were installed, respondent plainly is not entitled to the compensation requested. Respondent does not quarrel with this

conclusion and the court of appeals acknowledged its force, describing as "settled" the "common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets" (J.A. 68). Although the court of appeals acknowledged (*ibid.*) that neither the language nor the legislative history of the URA makes any mention of payment of compensation to utilities, it concluded that the "literal language of the statute" (J.A. 70) had the effect of changing the common law rule in this respect (J.A. 68-71). For the reasons that follow, we submit that that conclusion is erroneous.

B. Relocation Benefits Are Generally Available Only to Persons Displaced by An Acquisition of Real Property

We start with the language of the statute. See *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). In order to be eligible for relocation assistance under Section 202(a) of the URA, 42 U.S.C. 4622(a), a person is required to establish: *first*, that he has been displaced by an acquisition of the very real property he occupies for a federal program or federally-assisted state or local project (Section 101(6), 42 U.S.C. 4601(6), and Section 202(a), 42 U.S.C. 4622(a)); *second*, that he has "move[d] from real property, or move[d] his personal property from real property" (Section 101(6), 42 U.S.C. 4601(6); see also Section 217, 42 U.S.C. 4637); and *third*, that the compensation sought falls within the categories of expenses covered under Section 202(a)(1)-(3) of the Act, 42 U.S.C. 4622(a)(1)-(3).[20]

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[20] No question is presented in this case concerning any of the alternate or supplemental forms of relocation benefits

1. In the typical case of a utility that relocates its lines to accommodate a federally assisted local public works project such as road improvements or sewer line installation, relocation assistance cannot be had under the URA because the utility cannot meet the first of the three statutory requirements noted above. In Section 101(6) of the Act Congress stipulated that a displaced person is one who moves from real property "as a result of the acquisition of such real property." 42 U.S.C. 4601(6). Similarly, the operative provision of the Act, Section 202(a), limits the payment of relocation costs to circumstances where "the acquisition of real property for a program or project undertaken by a Federal agency * * * will result in the displacement of any person." 42 U.S.C. 4622(a). And in *Alexander* v. *U.S. Department of Housing & Urban Development*, *supra*, 441 U.S. at 50-51, the Court emphasized:

> [T]he language and origins of the Relocation Act demonstrate that Congress initially intended to provide better relocation assistance when property is acquired for federal programs, not to extend assistance beyond that limited context to all persons somehow displaced by governmental programs.
>
> Congress' basic objective remained unchanged * * *.

But under the settled doctrine described above (pages 21-24) the displacement of utility lines from a location within public streets where they have been placed pursuant to franchise so as to accommodate a public project ordinarily entails no acquisition or

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provided by the Act. See 42 U.S.C. 4622(a) and (b), 4623-4624 (see page 4 note 3, *supra*). Petitioner does not claim eligibility under any of those provisions.

taking of property, for the local government already owns the right-of-way within which the project is to be located, and the utility's francise right itself is not deemed a compensable interest. Moreover, both the language and legislative history of the URA make clear that the term "acquisition" employed in the statute is synonymous with a taking of real property by exercise of the power of eminent domain or by negotiated sale, for which payment of compensation is required either by state law or the Fifth and Fourteenth Amendments. Indeed, the terms "acquisition" and "taking" are used interchangeably in the legislative history,[21] and in the text of the Act itself.[22] Accordingly, as the courts have recognized, relocation of utility lines in order to accommodate a public project generally does not trigger the relocation assistance provisions of the URA. See *Consumers Power Co.* v. *Costle*, 615 F.2d 1147, 1148-1149 (6th Cir. 1980); *Lone Star Gas Co.* v. *Landrieu*, No. 80-100-C (E.D. Okla. Mar. 30,

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[21] See, *e.g.*, H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 1 (1970) (statute applies to persons who have "real property taken"); *id.* at 21-24 (discussing real property acquisition policies). See also 115 Cong. Rec. 31533 (1969) (remarks of Sen. Muskie referring to "condemning of land"); *id.* at 31534 (remarks of Sen. Mundt describing relocation assistance as "additional compensation" available "when property is taken").

[22] Section 301(8), 42 U.S.C. 4651(8) provides (emphasis added):

> If any interest in real property is to be *acquired* by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the *taking* of his property.

1981),[23] *Public Service Co.* v. *Harris*, No. 79-C-37-BT (N.D. Okla. Aug. 22, 1980);[24] *Mountain States Telephone & Telegraph Co.* v. *Boise Redevelopment Agency*, No. 52891 (Idaho 4th Judicial D. Oct. 27, 1980), appeal pending, No. 13997 (Idaho Sup. Ct.);[25] *Artesian Water Co.* v. *State Department of Highways & Transportation*, 330 A.2d 432, 437-439 (Del. Super. Ct.), aff'd as modified, 330 A.2d 441 (Del. 1974); see also *Pacific Telephone & Telegraph Co.* v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 (1978) (applying analogous provisions of state law).[26]

2. Several factors are present in this case, however, that may require a somewhat different analysis. First, because the project involved was an urban renewal project that entailed acquisition of the parcels abutting the streets to be located, see *Berman* v. *Parker*, 348 U.S. 26, 28-30 (1954), rather than a project to be constructed within the street itself, such as the sewer lines involved in *Consumers Power Co.*, *supra*, or the highway project involved in *Artesian Water Co.*, *supra*, it is arguable that, for purposes of the URA, the cause for the relocation of respondent's lines was "the acquisition of real property" for a federally assisted project, and thus that the threshold "acquisition" requirement of Section 202

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[23] This decision is reproduced in the Joint Appendix at 319-332.

[24] This decision is reproduced in the Joint Appendix at 303-318.

[25] This decision is reproduced at Pet. App. C-1 to C-23.

[26] Significantly, when Congress intended to make relocation assistance available in the absence of an acquisition of real property it did so explicitly, as in Section 217 of the URA, 42 U.S.C. 4637. See page 3, *supra*, and pages 28-30, *infra*.

(a) is satisfied here. Yet, this circumstance alone would not suffice to make respondent eligible for assistance as a displaced person because Section 101(6) specifies that a displaced party must have occupied the very real property that is acquired, 42 U.S.C. 4601(6), whereas here the property acquired adjoins the street bed itself.

On the other hand, we must recognize that, under Virginia law, petitioner's acquisition of parcels adjoining the streets to be closed gave petitioner title to the street beds themselves. See pages 7-8, *supra*. As a practical matter, that ancillary "acquisition" in turn made it possible for petitioner to persuade the City of Norfolk to close the streets, ousting respondent's franchise. It is accordingly at least arguable that displacement of respondent's lines from the streets wherein they were located "result[s] [from] the acquisition of *such* real property" within the meaning of Section 101(6) of the Act." It may still be answered, of course, that the operative cause of displacement is not the acquisition of the street bed in a case such as this. And indeed there is little to be said for a rule under which the result turns upon the fact that petitioner, a municipal corporation distinct from the City of Norfolk, is carrying out the federally assisted project, and thus in some technical sense "acquires" the real estate occupied by respondent's lines, whereas if the City, which already owned the public right-of-way, were itself the project sponsor, no acquisition would be recognized.

In addition to the factual circumstances and provisions of local law that set this case apart from the typical situation in which utility lines are displaced by local public works, account must be taken of the bearing of the special provisions of Section 217 of

the URA, 42 U.S.C. 4637. Under Section 217 one who moves as a "direct result" of an urban renewal project is "deemed to have been displaced as the result of the acquisition of real property." Displacement of respondent's lines in the streets closed in the urban renewal project areas may fairly be considered a direct result of the urban renewal project—even if not a direct result of a particular acquisition. Yet legislative history of Section 217 suggests that it was not intended to waive the acquisition requirement in the circumstances of this case.[27]

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[27] The House report accompanying S. 1, 91st Cong., 1st Sess. (1969), the bill that became the URA, states that Section 217 was included in the bill to conform to existing relocation programs operated by the Department of Housing and Urban Development. H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 20 (1970). But, as is indicated below (page 45 note 38), under HUD's regulations in effect when the URA was enacted, no relocation benefits were available to a utility in respondent's situation.

The House Report also recites (*ibid.*)

> This sec[t]ion provides that any person who moves as a result of a rehabilitation, demolition or concentrated code enforcement program under title I of the Housing Act of 1949, or a comprehensive city demonstration project under title I of the Demonstration Cities and Metropolitan Development Act of 1966, shall be considered to be displaced as a result of the acquisition of real property for such a program or project.

A more complete explanation of the purpose of Section 217 is provided in the legislative history of a predecessor to the URA, S. 1681, 89th Cong., 2d Sess. (1966), which was enacted by the Senate but did not receive final action in the House in 1966. Section 9 of S. 1681 was nearly identical to Section 217 of the 1970 Act. The Senate Report explained Section 9 of the bill as follows (S. Rep. No. 1378, 89th Cong., 2d Sess. 32-33 (1966)):

> This assures that relocation payments are available to those displaced as a result of code enforcement, demoli-

There is no occasion to sort out these complexities further here, however. Instead, we may simply assume for present purposes that respondent—unlike a typical utility with lines displaced by a public works project—can satisfy the first of the statutory requirements for eligibility for relocation benefits that we have described. For, as we explain below, respondent plainly can not satisfy the remaining requirements for compensation established by the URA.

C. Respondent's Reconstruction of Its Lines Does Not Constitute Moving of Personal Property that is Compensable Under the Act

1. As previously indicated, in order to establish eligibility for relocation assistance under Section 202(a) of the URA, respondent is required to demonstrate not only that the cause of displacement of its lines is an acquisition of the very real property it occupies, but also that it has "move[d] from real property, or move[d] [its] personal property from real

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tion activities, or voluntary rehabilitation activities carried out with assistance authorized by title I. Frequently, displacements occur even though the property is not acquired as a result of these projects. In addition, the provision would permit relocation payments to be made to anyone displaced from an urban renewal area in which a project receiving Federal financial assistance is being carried out. Such payments will be made regardless of whether the property from which the person is being displaced is acquired with federal financial assistance.

This legislative history confirms that in dispensing with the normal acquisition requirement for relocation assistance eligibility in urban renewal areas Congress' intention was merely to protect persons displaced by programs such as housing code enforcement and by acquisitions within an urban renewal area that are not carried out with federal funds rather than to benefit utilities, or others similarly situated.

property" (Section 101(6), 42 U.S.C. 4601(6)). Alternatively, assuming that respondent can satisfy the threshold acquisition requirement by recourse to the fiction embodied in Section 217, it must nevertheless establish that it has "move[d] or discontinue[d] [its] business, or move[d] other personal property, or move[d] from [a] dwelling." 42 U.S.C. 4637. Respondent cannot satisfy this additional requirement. Respondent does not suggest that it has moved or discontinued its business, moved itself (a term that appears to refer to the move of a business or of a natural person from a dwelling) or moved from a dwelling. Thus, whether analyzed under Section 101(6) or Section 217, the pertinent question is whether Congress intended to treat reconstruction of utility lines to accommodate public works as moving of personal property under the URA.

Contrary to the court of appeals' apparent assumption (J.A. 65), respondent did not remove its lines from their original locations in the realigned streets and reinstall this equipment in the new street locations.[28] Rather, respondent simply abandoned its conduits and manholes in place and constructed new lines as substitutes. While respondent did remove its cables from the conduits in which they had been installed, those cables were not transferred to the new street locations. See pages 8-9, *supra*. Accordingly, respondent simply has not moved personal property within the meaning of Section 101(6) or Section 217; it therefore cannot qualify for relocation benefits under the Act.

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[28] The HUD area manager's decision also appears to adopt this erroneous premise. See J.A. 278. HUD's decision in this case did not, however, turn on this point.

Nor is there any reason to believe that the facts of this case are unique in this respect. So far as we are aware, when utilities relocate lines in order to accommodate public improvements, it is commonplace simply to abandon equipment in place and construct new lines to replace the lines removed from service. This practice is reflected in those few statutes that Congress has enacted that do make provision for payment of relocation assistance to utilities in particular circumstances. See 23 U.S.C. 123; District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812. The formula for computing such assistance in each of these statutes contemplates reconstruction of the utility line, and abandonment or salvage of the old equipment. See pages 43-47, *infra*. And even where the old equipment is salvaged in part and incorporated into the substitute line, the net effect is scarcely one that can most aptly be described as "moving" of personalty or of a business.[29]

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[29] In determining whether respondent is eligible for assistance the court of appeals seemingly overlooked this statutory requirement and focused upon the separate (albeit closely related) question whether the property involved was realty or personal property (J.A. 74-78). The court of appeals thereby missed the dispositive point.

In any event, the court of appeals' conclusion that the property involved is personalty appears to be at least partly incorrect. The record of this case makes clear that respondent's conduits and manholes were permanently affixed to the streets in which they were installed. For instance, manholes —which consist of far more than meets the pedestrian's eye— are actually typically precast concrete structures with walls one foot thick, and inside dimensions twelve feet long, six feet wide, and seven feet deep, with the familiar access hole and metal cover at the top. These manholes are installed permanently in the ground (J.A. 116-119), just like the foundation of a building. Respondent's conduits were also

2. Even if respondent had physically moved its equipment from the old street locations to the new, the result would be no different. "As in all cases of statutory construction," in considering whether reconstruction of a utility line qualifies as moving of personal property for purposes of the URA, the Court's "task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). The legislative

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designed and intended to provide service indefinitely in their location; they were not removed when the lines were removed from service (J.A. 133, 140). Only respondent's cables—the actual electrical wires running through the pipelike conduits—were removed when respondent removed the lines in question from service (J.A. 133). In the circumstances, the bulk of respondent's equipment consisted of fixtures annexed to the land, and adapted for indefinite use in their existing location, but not suitable for removal and reuse in any other location. Accordingly, under Virginia law this equipment or at least the bulk of it was to be treated as real property. See *Transcontinental Gas Pipe Line Corp.* v. *Prince William County*, 210 Va. 550, 172 S.E. 2d 757 (1970). Contrary to the court of appeals' assumption (J.A. 75-77) respondent's retention of the legal right to remove its equipment is not inconsistent with classification of the property as a fixture annexed to the land. *Transcontinental Gas Pipe Line Corp.* v. *Prince William County, supra*, 210 Va. at 556, 172 S.E. 2d at 762. Unlike the court of appeals (J.A. 76-77), moreover, in characterizing respondent's equipment, we find it difficult to discount the real property characterization assigned to that equipment by respondent itself for purposes of state property taxation.

Assuming that some part of the respondent's equipment was properly regarded as personalty under state law, for the reasons stated in the text, it does not follow that, for purposes of the URA, the reconstruction of respondent's lines constitutes "*mov*[*ing of*] personal property." The latter question, of course, is a question of federal, rather than state law.

history of the URA detailing those purposes strongly suggests that, in authorizing compensation for persons who move from real property, Congress did not contemplate provision of compensation to utilities for reconstruction of lines located pursuant to municipal franchise within public streets.

Congress was prompted to enact the URA by its recognition that it had created a host of federal programs (and had provided federal support for state activities) that required the taking of privately held real property, without providing any assurance that such takings did not impose undue hardships on displaced persons. Congress was aware that the traditional rules governing just compensation for the taking of real property that had been developed by the courts under the Fifth Amendment limited compensation to the market value of property taken, without any element of compensation for the expense of relocating personal property, or a business. It was further recognized that "just compensation" included no allowance for the hardship created by the discrepancy that frequently exists between the market value of premises taken and the cost of acquiring substitute facilities. Congress thus perceived that the existing limits on compensation had the practical effect of placing homeowners, residential tenants, and businesses that were displaced by federal projects in a position inferior to that enjoyed prior to the taking. S. Rep. No. 91-488, 91st Cong., 1st Sess. 1-2, 6-8 (1969); H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 1-3 (1970); 115 Cong. Rec. 31533 (1969) (remarks of Sen. Muskie); *id.* at 31534 (remarks of Sen. Mundt); 116 Cong. Rec. 40167 (1970) (remarks of Rep. Edmondson); *id.* at 40170 (remarks of Rep. Cohelan).

The URA was enacted as the culmination of almost ten years of congressional consideration. See *Alexander* v. *U.S. Department of Housing & Urban Development*, *supra*, 441 U.S. at 49-53. The Senate enacted predecessor versions of the URA in the 89th Congress in 1966 and in the 90th Congress in 1968. See S. Rep. No. 91-488, *supra*, at 4-5. The text and legislative history of these bills is entirely silent respecting the issue of utility relocation. See, S. Rep. No. 90-1456, 90th Cong., 2d Sess. (1968); S. Rep. No. 1378, 89th Cong., 2d Sess. (1966).

Extensive hearings were held upon the proposed URA in both the House and Senate in the 91st Congress. See *Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S. 1 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess. (1969); *Uniform Relocation Assistance and Land Acquisition Policies—1970: Hearings on H.R. 14898, 14899, S. 1 and related bills Before the House Comm. on Public Works*, 91st Cong., 1st & 2d Sess. (1969-1970). But at no point during these hearings was any suggestion made that the proposed bill would have any effect upon the common law rule that requires utilities to bear their own relocation costs. Indeed, although representatives of diverse interest groups were heard, the only representatives of an organization representing the interests of utilities to appear made no reference whatsoever to the relocation need of utilities. See *House Hearings*, *supra*, at 279-285 (testimony of Karl Baetzner, Vice President, American Right-of-Way Ass'n; statement of Harold Lewis, American Right-of-Way Ass'n). The Senate and House reports on the URA are equally silent as to any application of the legislation to displaced utility

facilities.[30] Instead, both make clear that Congress' concern was with homeowners and residential tenants forced from their homes, and with conventional business premises taken in order to accommodate federal or federally assisted projects. See S. Rep. No. 91-488, *supra*, at 1-2, 6-7, 9; H.R. Rep. No. 91-1656, *supra*, at 1-3; cf. 42 U.S.C. 4601(7) (definition of "business").[31] Thus there is no indication whatever that

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[30] ...nicus curiae Boston Redevelopment Authority observes (Br. 19-20) that, as reported by the Senate Committee, the relocation assistance bill included, within the definition of a displaced person, a proviso that

> [T]he term "displaced person" shall not include the owner of personal property on the premises of another under a lease or licensing arrangement where such owner is required pursuant to such lease or license to move such property at his own expense.

S. 1, 91st Cong., 1st Sess., § 105(5) (1969); 115 Cong. Rec. 31372 (1969). There is no indication in the legislative history that this ambiguous provision was intended to refer to public utility lines located in public streets pursuant to municipal franchises, and the language chosen does not seem apt for that purpose. Accordingly, the fact that the House version of the bill ultimately enacted includes no such language has no particular significance.

[31] Because respondent is engaged in the "sale of services to the public" (42 U.S.C. 4601(7)(B)) we do not question that it is a business that may qualify as a displaced person when it is required to move its personal property from realty by a federal acquisition of the real property. Compare pages 13-14, *supra*. Thus respondent as a utility is not disqualified from receiving the relocation assistance that the Act extends to commercial tenants whose offices are displaced. But the statutory definition of "business" reflects Congress' interest in insulating conventional commercial manufacturing, and service establishments from the costs of displacement, and that mere maintenance of property was not regarded as a protected interest.

Congress regarded the reconstruction of utility lines as moving of personal property from real property for purposes of the URA. By contrast, as we explain below (pages 43-46), when Congress intends to provide for payment of utility relocation costs, as it has done in several specialized settings, it has done so explicitly.

The court of appeals reasoned that in the absence of "any clear legislative intent to exclude utilities" from the coverage of the URA, it was obliged "to apply the literal language of the statute" so as to include utilities (J.A. 70). The absence of any affirmative expression of an intent to benefit utilities was deemed irrelevant (J.A. 68) because of the perceived mandate for uniformity in the availability of benefits (J.A. 70). The court of appeals overlooked, however, the eligibility requirements of the Act that define the "uniform" availability of benefits thereunder—including the requirement that a person demonstrate that he has moved his personal property. Because the statutory term "moves * * * personal property" would not commonly be understood to apply to the reconstruction of utility lines within the public streets, and because Congress' attention was focused exclusively on the problems of residential tenants and conventional business premises, the inference to be drawn from Congress' silence respecting the unique situation of utility franchise holders is that Congress did not alter the settled common law rule allocating the cost of utility line relocations to the franchise holder.

Significantly, in an analogous context when Congress meant to allow compensation for the movement of semi-permanent structures, it made that intention explicit. See 42 U.S.C. 4601(7)(D) (billboard relocation).

3. The existence of that settled common law rule is in itself reason to resolve any doubts respecting Congress' intentions against utilities such as respondent, see *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 304-305 (1959), for the status of utility franchises at common law was both unique and well known. The court of appeals suggested that because the URA created rights unknown at common law, it should not be presumed that Congress preserved the common law rule allocating the cost of utility relocations caused by public projects to the utilities (J.A. 68-70). Here, again, the court of appeals overlooked the statutory language that defines and limits the rights that were created by the URA. For instance, the court of appeals observed that a residential tenant-at-will (who enjoyed no property right recognized at common law) can recover relocation expenses as a displaced person under the Act (J.A. 68-69). The court's observation is wide of the mark, however, for there can be no question that a tenant at will displaced from residential premises typically "moves" personal property from one location to another. Because there is no ambiguity in applying the statute to this situation, there is no occasion to interpret the statutory language against the backdrop of the settled common law doctrine.[32] But in the case of

[32] The court of appeals cited no statutory language, legislative history or other authority for its assertion that residential tenants at will are entitled to relocation assistance under the URA. We note that Section 204 of the URA, which creates a system of replacement housing cost payments for displaced residential tenants that is separate and apart from the relocation payments required by Section 202(a) and (b), specifies that payments are to be made to a displaced person who "actually and lawfully occupied" the premises from which he was displaced "for not less than ninety days prior to the

a utility that seeks compensation for reconstruction of its lines—an event that does not on its face resemble "moving" of personal property—it is perfectly appropriate to refer to the pre-existing law to ascertain congressional intent.

The legal status of residential tenants-at-will at common law is in yet another respect to be distinguished from that of a utility that locates its lines in public streets pursuant to a municipal franchise. Unlike the rules that govern the former—which grow out of the private landlord-tenant relationship—the noncompensability of relocation of utility lines is a doctrine developed specifically to govern the rights and obligations of utilities as against the public. Because local ordinances, state laws and contractual agreements expressly limit the liabilities of local government entities in this situation, it should not lightly be inferred that Congress intended to augment those liabilities. In short, while a residential tenant-at-will may have no property right at common law that entitles him to demand compensation, the acquiring authority has no vested right *not* to pay such compensa-

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initiation of negotiations for the acquisition of such dwelling." 42 U.S.C. 4624. This language does suggest that tenants-at-will may be eligible for benefits under Section 204. While the requirements of Section 204 do not control eligibility for relocation benefits under Section 202(a), the former provision may indicate that Congress intended to include tenants at will under Section 202(a) as well. Of course, there is no comparable indication in the statute that utilities that lack protected property rights in the location of their lines were to be granted relocation assistance. For this additional reason, assuming that the definition of a displaced person contained in Section 101(6) of the Act is broad enough to encompass residential tenants-at-will, a similar conclusion is not required as to utilities that reconstruct their lines.

tion. In the case of utility displacements, however, the common law provides the local government with the right to insist that the utility bear the cost of relocation of its lines. If Congress intended to alter that rule, it undoubtedly would have done so in language far clearer than that employed here. See *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 16-17 (1981).[33]

D. The Reconstruction Costs Sought by Respondent are Outside the Scope of Relocation Assistance Available Under Section 202(a)(1)-(3) of the URA

The final statutory requirement for the recovery of relocation assistance under Section 202(a) of the URA is that the claim must represent expenditures for items that are eligible under Section 202(a)(1)-(3). Under those provisions a displaced person is entitled to (42 U.S.C. 4622(a)(1)-(3)):

> (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property;

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[33] As note above (pages 4-5), the URA is applied to states and local government entities that acquire real property pursuant to federally assisted programs through the condition that disbursement of grant funds await receipt of assurances from the grantee that it will comply with the requirements the Act imposes directly on federal agencies. See 42 U.S.C. 4630. Because neither the statutory text nor the legislative history reflects that utilities must be paid relocation compensation denied them by state law, Congress plainly has not "sp[oken] with [the] clear voice" that is necessary if the states are to be held to have knowingly shouldered the obligations that, in respondent's view, are imposed upon them by the Act. See *Pennhurst State School & Hospital* v. *Halderman*, *supra*, 451 U.S. at 17.

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; and

(3) actual reasonable expenses in searching for a replacement business or farm.

Because the district court did not reach the question of damages, the court of appeals evidently assumed that it had no occasion to address the eligibility of the costs for which respondent seeks compensation.[34]

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[34] The district court's bifurcation of the trial into liability and damages phases (see J.A. 34-35), suggests that it had lost sight of the fact that the action was commenced pursuant to the Administrative Procedure Act to secure judicial review of the Secretary's action on respondent's appeal from petitioner's denial of its claim. The terms of the court of appeals' remand (see page 14 n.17, *supra*) suggest that it, too, had lost sight of the nature of respondent's cause of action. Under the Administrative Procedure Act, the proper course upon determining that respondent had some right to relocation assistance would have been to remand the case to the agency for determination of the claim. The agency, might in turn deem it proper to return the matter to petitioner, for its determination, in the first instance, of the amount of assistance due.

It is true that, in addition to declaratory relief and an order directing HUD to compel petitioner to pay its claim, respondent also sought a money judgment against both the federal defendant and petitioner (see J.A. 13) in the amount of the relocation benefits claimed, plus interest. But respondent has identified neither any waiver of sovereign immunity applicable to its money claim against the United States, nor any jurisdictional basis for presenting such a claim in the district court. Compare 28 U.S.C. 1346(a)(2). As for respondent's money claim against petitioner, it is at least an open question

But because it appears as a matter of law that the costs for which reimbursement is sought by respondent are outside the scope of the Act, it is appropriate to address the issue briefly here.

Given the posture of this case, it is difficult to be certain what the $686,422.53 claim tendered by respondent encompasses. It appears, however, that this sum represents primarily the cost to respondent of constructing its substitute lines in the new street locations created pursuant to the urban renewal plan (see J.A. 7).[35] But, for the reasons already stated (pages 30-40), this expense simply cannot be equated with the expense of moving personal property or a business. See 42 U.S.C. 4622(a)(1).[36]

It is especially significant, we submit, that the measure of compensation that is sought—the cost of construction of substitute facilities—is precisely that denied by the common law rule that governs the relationships of municipalities and their franchisees. No argument is available that the items for which compensation is sought are somehow distinct from those for which compensation is denied under the rule of state law. By contrast, assuming that relocation as-

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whether the URA or any other federal statute authorizes entry of such a judgment; moreover, a valid jurisdictional basis may be lacking. See *Department of Transportation & Development* v. *Beaird-Poulan, Inc.*, 449 U.S. 971 (1980) (Rehnquist, J., dissenting from the denial of certiorari).

[35] As indicated previously, respondent abandoned most of its facilities in place and constructed new ones. We do not understand respondent to claim that the rather limited work done to remove cables from the conduits to be abandoned accounts for the entire sum requested.

[36] Nor can it be equated with the value of "direct losses of tangible personal property as a result of moving or discontinuing a business" (42 U.S.C. 4622(a)(2)). Cf. *United States* v. *564.54 Acres of Land*, 441 U.S. 506 (1979).

sistance is to be paid to a tenant-at-will who lacks a compensable real property right at common law (see page 38 note 32, *supra*), the benefits available are for actual moving expenses, coupled with a special rent subsidy under Section 204 of the Act. These items are distinct from the market value of a leasehold—the item for which no compensation is due to a tenant-at-will under common law.

Thus, the court of appeals erred in suggesting (J.A. 78; see page 15, *supra*) that its decision was consistent with the purpose of limiting relocation benefits to the expense of moving personal property. Statutory relocation benefits were intended to cover a particular type of costs not addressed by preexisting law. See page 34, *supra*. But the cost of utility relocation was not a matter overlooked by the common law. Instead, that expense was deliberately assigned to utilities. Congress did not alter that allocation.

E. Congress' Failure in the URA To Repeal 23 U.S.C. 123 and the Subsequent Enactment Of The District of Columbia Public Utilities Reimbursement Act of 1972 Indicate That Congress Did Not Intend To Require Payment Of Relocation Expenses To Utilities under the URA

1. When it enacted the URA, Congress simultaneously repealed the many scattered provisions of law providing for relocation assistance to individuals, businesses, and farmers dislocated by various federal projects and programs. Section 220 (84 Stat. 1903). Among the laws so repealed were the relocation assistance provisions of the Federal Aid Highway Act of 1968, former 23 U.S.C. (1970 ed.) 501 *et seq.*—the statute upon which the URA itself was modeled. See S. Rep. No. 91-488, *supra*, at 4-5; *Triangle Improve-*

ment Council v. *Ritchie*, 402 U.S. 497, 499-500 (1971) (Harlan, J., concurring); *id.* at 504 n.1 (Douglas, J., dissenting). The relocation provisions of the 1968 Highway Act provided a broad range of relocation assistance to those displaced by federally-funded state highway construction. However, the 1968 Act did not provide for relocation assistance to utilities that were required by highway construction to relocate their facilities from the public rights-of-way. The availability of such relocation assistance instead continued to be governed by 23 U.S.C. 123, enacted as part of the Federal-Aid Highway Act of 1958, which stipulates that federal funds may be used to pay utilities' relocation expenses *only* when state law already specifically so provides.[37]

Although Congress repealed the general relocation assistance provisions of the Federal-Aid Highway Act in their entirety at the time it passed the Uniform Relocation Act, it left Section 123 untouched. Thus, utilities that are required to relocate their facilities to accommodate federally-assisted highway construction are not eligible for relocation assistance unless state law expressly so provides. In view of Congress' sweeping and methodical repeal of other provisions of law that were inconsistent with or absorbed by the URA

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[37] 23 U.S.C. 123 provides in pertinent part that:

> (a) When a State shall pay for the cost of relocation of utility facilities necessitated by the contruction of a project on the Federal-aid primary or secondary system or on the Inter-state System, * * * Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.

(see H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 26-40 (1970)), it is difficult to believe that Congress would have left Section 123 standing if it contemplated provision of relocation benefits to all utilities displaced by federal or federally-assisted projects under the URA. Congress' failure to repeal Section 123 indicates its intention to leave the common law rule of compensation unaffected by the URA.[38]

2. That Congress did not intend in enacting the URA to require compensation of utilities for relocation expenses is also indicated by enactment less than two years later of the District of Columbia Public Utilities Reimbursement Act, Pub. L. No. 92-495, 86 Stat. 812. The express purpose of the Public Utilities Reimbursement Act was to require the compensation of utilities for relocation expenses that resulted from urban renewal and highway building projects in the District of Columbia. See S. Rep. No. 92-1254, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 92-906, 92d Cong., 2d Sess. (1972). Congress passed the District of Columbia Public Utilities Reimbursement Act, notwithstanding the fact that pursuant to the URA the District of Columbia is deemed a "State" and the District of Columbia Redevelopment Land Agency, the

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[38] Whether amounts paid by states that, pursuant to *state* law, compensate utilities for their relocation expenses are includable within the federal share of the cost of particular projects (independently of the URA) turns upon the provisions of the particular federal grant program. The urban renewal regulations of the Department and Housing and Urban Development provide that such costs are allowable as a project expense, if, and only if, compensation is required under applicable state law, local ordinances or the terms of the franchise. *Urban Renewal Handbook* RHA 7209.1, ch. 2 (reproduced at page 63 of the amicus brief of the Boise Redevelopment Agency, filed in support of the petition for a writ of certiorari); see also J.A. 43.

local urban renewal agency for the District of Columbia, a "State agency." 42 U.S.C. 4601(2) and (4). Because the provisions of the URA covered the District of Columbia and its urban renewal activities, enactment of the District of Columbia Public Utilities Reimbursement Act would have been unnecessary if Congress believed that the Uniform Relocation Act already provided these relocation benefits to utilities.[39]

3. Under any standard, the determination of relocation costs incurred by a utility is complex. As we have already explained (pages 30-43), those costs are not comparable to the expenses of moving personal property faced by families and businesses that move. Moreover, in constructing new substitute facilities the utility acquires equipment that has a longer residual life than and is more valuable than, the lines displaced. See *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 518 (1979) (White, J., concurring). In addition, the utility may receive some salvage value for part of its equipment removed from service. Significantly, whenever Congress has determined that utility relocation costs should be paid or reimbursed by a federal agency or its grantees, it has made explicit provision for deducting the enhanced value of the substitute facility and the salvage value of the old equipment from the cost of the substitute facility, in determining the "cost of relocation." See 23 U.S.C. 123(c); District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, Sec-

[39] The effect of enactment of the District of Columbia Act is to make payment of utility relocation costs an eligible project cost for purposes of determining the federal share of the cost of any urban renewal project under HUD urban renewal regulations, see page 45 note 38, *supra*, and the federal share of any federally-assisted highway project pursuant to 23 U.S.C. 123.

tions 2 and 4, 86 Stat. 812-813. The absence of any comparable provision in the URA is yet another indication that Congress did not intend by the Act to require payment of relocation assistance to a public utility that relocates its lines in order to accommodate a public project.

CONCLUSION

The judgment of the court of appeals should be reversed.[40]

Respectfully submitted.

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MAY 1983

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[40] Although the Secretary defended HUD's action in this case in the district court and the court of appeals, we urged at the petition stage that the petition be denied, and suggested, moreover, that "the court of appeals' interpretation of the Act is a reasonable one" (Fed. Resp. Br. in Opp. 5). Having reexamined the merits, we are now persuaded, for the reasons stated above, that the decision below is erroneous. Moreover, because our argument rests directly upon the language of the schedule establishing the requirements for eligibility for relocation assistance, we now believe it entails no interpolation into the Act of an implied exclusion affecting "one form of business" (see page 36 n.31, *supra*; compare Fed. Resp. Br. in Opp. 5).

APPENDIX

The Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. 4601 *et seq*, provides in relevant part:

Section 101, 42 U.S.C. 4601:

As used in this chapter—

* * * * *

(6) The term "displaced person" means any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

Section 202(a), 42 U.S.C. 4622(a):

(a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after January 2, 1971, the head of such agency shall make a payment to any displaced person, upon proper application as approved by such agency head, for—

(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; and

(3) actual reasonable expenses in searching for a replacement business or farm.

Section 210, 42 U.S.C. 4630:

Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, unless he receives satisfactory assurances from such State agency that—

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 4622, 4623, and 4624 of this title;

* * * * *

Section 213, 42 U.S.C. 4633:

(a) In order to promote uniform and effective administration of relocation assistance and land acquisition of State or local housing agencies, or other agencies having programs or projects by Federal agencies or programs or projects by State agencies receiving Federal financial assistance, the heads of Federal agencies shall consult to-

gether on the establishment of regulations and procedures for the implementation of such programs.

(b) The head of each Federal agency is authorized to establish such regulations and procedures as he may determine to be necessary to assure—

(1) that the payments and assistance authorized by this chapter shall be administered in a manner which is fair and reasonable, and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this subchapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the Federal agency having authority over the applicable program or project, or in the case of a program or project receiving Federal financial assistance, by the head of the State agency.

(c) The head of each Federal agency may prescribe such other regulations and procedures, consistent with the provisions of this chapter, as he deems necessary or appropriate to carry out this chapter.

Section 217, 42 U.S.C. 4637:

A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after January 2, 1971, as

a direct result of any project or program which receives Federal financial assistance under title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under title I of the Demonstration Cities and Metropolitan Development Act of 1966 shall, for the purposes of this subchapter, be deemed to have been displaced as the result of the acquisition of real property.

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